

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
K&A GAS & GO MART, INC.	:	
AND KASSEM ABDO	:	DETERMINATION
for Revision of Determinations or for Refund of Sales and	:	DTA NOS. 823020 AND
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	823021
Period September 1, 2003 through August 31, 2006.	:	

Petitioners, K&A Gas & Go Mart, Inc. and Kassem Abdo, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2003 through August 31, 2006.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at One Centre Street, New York, New York, on December 15, 2009, with all briefs due by June 18, 2010, which date began the six-month period for the issuance of this determination. The time for the issuance of this decision was extended for 90 days, until March 19, 2011, pursuant to 20 NYCRR 3000.5(d). Petitioners appeared by Jaqueline S. Antonious, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori Antolick, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly resorted to an estimated audit methodology to determine petitioners' sales and use tax liability for the period in issue.

II. Whether the Division of Taxation, using the cost markup audit method on petitioners' purchases of gasoline and convenience store items, properly determined petitioners' additional sales tax liability.

III. Whether petitioners have demonstrated reasonable cause for the abatement of penalties asserted by the Division of Taxation pursuant to Tax Law § 1145.

FINDINGS OF FACT

1. K & A Gas & Go Mart, Inc. (petitioner) is a busy Sunoco gas station located in Brooklyn, New York, with a large attached convenience store where nonfuel items such as cigarettes, soda, candy, motor oil, detergent and sundry nontaxable items are sold. The gas station sells motor fuel, but has no diesel fuel sales and has no repair shop. Petitioner and its owner and sole shareholder, Kassem Abdo, are assessed in this case. Mr. Abdo's status as a responsible officer of the corporation under the Tax Law is not disputed.¹

2. The Division of Taxation (Division) conducted a sales tax audit of petitioner at the site of its business for the period September 1, 2003 through August 31, 2006 and determined that it had underreported its sales of fuel and nonfuel items.

3. The Division corresponded with petitioner on November 27, 2006 for the purpose of setting a mutually agreeable time for the audit of petitioner's sales tax returns. Correspondence addressed to petitioner dated December 6, 2006 confirmed the agreed upon date of December 14, 2006 to commence the field audit at petitioner's office. The "records requested list" attached to the December 6, 2006 letter included the following documents and information for the entire audit period: sales tax returns, related schedules and supporting work papers and schedules; FT-943

¹ Since the asserted liability of the corporate petitioner is the basis for the asserted liability of both the corporation and its sole shareholder, the term "petitioner" applies to the corporation, but includes both taxpayers.

service station reports; inventory records; invoices from suppliers; fuel disbursements, both sales and self-use; cash register tapes; pump meter readings; daily shift sheets; worksheets and cancelled checks; federal corporate income tax returns and New York State corporation tax returns, with supporting work papers; cash receipts and cash disbursements journals; the general ledger; sales journals and invoices; checkbook registers; exemption documents; capital asset purchase and sales invoices; equipment listing; payroll records; daily pump prices; and charge card slips. At no time during the audit of petitioner were all of these records produced simultaneously for inspection.

4. At the time of the audit, petitioner submitted handwritten daily shift reports (ledger), on which the gas station manager, Khan Azmal, had recorded the number of gallons of the four different types of gasoline sold, the total gallons sold and total sales from the convenience store on each day. This ledger did not show dollar amounts for fuel sales and did not separate taxable and nontaxable nonfuel sales from the convenience store items. Petitioner also provided some purchase invoices for both fuel and nonfuel purchases. However, the Division's auditor was not able to confirm that the invoices represented all purchases.

5. On December 13, 2006, a Division investigator conducted an observation of petitioner's business. He took note of its operations, listed the taxable and nontaxable items sold in the convenience store, took some pictures of the pumps and storefront, and noted the cigarette price list as advertised on the same day. The investigator estimated that approximately 95% of the items sold in the convenience store were subject to the collection of sales tax.

6. Since the auditor did not receive records of sales of fuel and nonfuel products in dollar amounts and no source documentation was provided, petitioner's records were deemed inadequate. As a result, the auditor requested that petitioner agree to a test period method to

complete the audit. On December 14, 2006, at the scheduled field audit appointment, petitioner agreed to and signed a Test Period Audit Method Election form. According to the election form, the test period selected was June 1, 2005 through August 31, 2006. The Division's auditor, however, chose six quarters to use as the test period; the five quarters in the agreed period of June 1, 2005 through August 31, 2006, plus the quarter June 1, 2004 through August 31, 2004.² He analyzed the quarters by looking at invoices or bills of lading to determine how many gallons of gasoline were purchased and how much was paid for it. The auditor determined that for the test period, the number of reported gallons of gasoline sold was very close to the number of gallons purchased. In addition, on the basis of the same invoices, the auditor was able to determine the purchase price per gallon including all the taxes.

7. In order to utilize petitioner's purchase records to determine sales, it was necessary for the Division's auditor to calculate markup percentages on the gasoline. Petitioner did not have sales records showing the sales per gallon, or totals, until it created daily shift tapes from its new registers, installed on or about July 6, 2006. The new register system did not delineate between taxable and nontaxable nonfuel sales. However, with information from the post-July 6, 2006 daily shift tapes and petitioner's cost records, the auditor was able to compute an average markup per gallon and a percentage of the cost per gallon of the two types of gasoline purchased (regular and premium), from which two other grades of gasoline were created and sold. Those markup percentages were 7.3% for regular gasoline and 8.7% for premium gasoline.

8. Using petitioner's invoices for gallons of gasoline purchased, the auditor accepted gallons purchased as gallons sold and extracted from those invoices the price per gallon. He

² The use of the additional quarter in the test period was not disputed.

applied the markup percentages he had computed on the two grades of gasoline, to arrive at an audited pump price. He multiplied the gallons sold by the audited pump price (not having the actual pump price) to arrive at gross fuel receipts. He compared gross fuel receipts to what was reported by petitioner and calculated additional gross receipts for the test period of \$378,336.00. He divided that result by the reported gross receipts for the same period in the amount of \$1,723,486.00, to arrive at an error rate of 22%.

9. The calculated error rate was applied to the audit quarters not covered by the test period, i.e., September 1, 2003 through May 31, 2005.³ Specifically the error rate of 22% was multiplied by the gross fuel receipts as reported by petitioner. This resulted in audited gross fuel receipts, which were then multiplied by the New York State excise tax rate of 8%. The excise tax was subtracted from gross fuel receipts to determine gross sales subject to sales tax. The appropriate sales tax rate for each quarter during the audit period (either 8.375% or 8.625%) was used to back out the sales tax in the gross amount to arrive at taxable fuel sales.⁴ The sales tax due was then identified as a separate amount. The prepaid tax on gasoline was calculated by applying the appropriate rate for each quarter, ranging from 10.9% to 17%, to the gallons reported sold by petitioner on its returns and for the quarters of the test period, to the gallons purchased. The sales tax due less the prepaid tax as calculated, less the tax already remitted with petitioner's service station reports (form FT-943) resulted in additional sales tax due from the audit pertaining to fuel sales in the amount of \$78,301.56.

³ The auditor explained that with a change in the Tax Law effective June 1, 2006, the sales tax is calculated differently than for the other four quarters used to determine the error rate. Thus, he did not use the test period quarter ending August 31, 2006 in his error rate calculation.

⁴ The auditor's work also reflected a change in the Tax Law effective June 1, 2006 for the quarter ended August 31, 2006 in his calculation of taxable fuel sales and fuel sales tax due for that quarter.

10. In addition to the ledger described in Finding of Fact 4, a second ledger was created and introduced into evidence by petitioner at the hearing. The auditor remembered reviewing the first ledger, but recalled seeing the second one only about a month before the hearing. The additional ledger listed the following for each day: total gallons sold, an amount deducted from gallons sold to account for 1% leakage, gross fuel sales, taxable nonfuel sales, gross nonfuel sales and gross receipts. This new ledger was provided to the Division in March 2008 when Ms. Antonious commenced her representation of petitioner. However, during its preparation, Ms. Antonious located an error in the calculation of the federal excise tax resulting in approximately \$30,000.00 of additional fuel tax due. The auditor did not take the additional ledger into account for the audit calculations because the sales could not be traced to any source documentation. The auditor also had difficulty tracing the sales figures to the electronic daily shift tapes that were available for the last two months of the audit period.

11. Petitioner also submitted into evidence the following documents in support of its position:

(a) Detailed monthly gasoline inventory records prepared by petitioner, showing changes in inventory of Ultra-93 and regular gasoline for each day of the month. It listed existing gasoline inventory, gallons delivered, gallons sold, book inventory and leakage, in gallons. However, it was not a complete record, leaving out different months and different types of gas.

(b) The daily Oil Price Information Service (OPIS) records. These are credit card records for the Brooklyn zip code where petitioner's business is located. The Division did not use OPIS, a third-party verification option, in this case, since OPIS identifies the pump price only for the last transaction of the day and only for regular grade gasoline, and the Division had decided upon a cost markup method in the alternative.

(c) The US Department of Energy & Statistics Data listing the retail pump price of gasoline for the New York City area for the respective quarters in the audit period.

(d) A portion of 2003, 2005 and 2006 third-party records of cigarette purchases by petitioner from a company referred to as HLA.

(e) A calculation of the daily average retail price per gallon of gasoline for the audit period. It was identified as information from petitioner's books and records.

12. The Division's auditor was given the retail price calculation a month before the hearing. He considered the computation of the retail price per gallon of gasoline and compared it to the data he extracted from petitioner's own actual daily cash register shift reports for July 6, 2006 through August 31, 2006. He divided total fuel sales on a particular day by the total gallons of gasoline sold of all grades. The average price per gallon on any given day computed from the daily shift reports did not agree with the daily price per gallon offer as computed in petitioner's price calculation.

13. The Division introduced a schedule of the monthly average gasoline price list for the New York City Metropolitan area as researched by the auditor.

14. Petitioner submitted its own calculation of adjusted taxable fuel sales and a computation of proposed additional tax due in the amount of \$30,537.00, taking into account errors conceded by petitioner. This submission was an attempt by petitioner to identify corrected gross receipts from fuel sales, taking into account those calculation errors in reporting, resulting in additional tax due.

15. The Division's auditor gave consideration to the submission of adjusted taxable fuel sales and compared it to other information he had already obtained from petitioner during the audit, in order to determine the reliability of these calculations. He specifically compared the

second daily ledger submitted by petitioner, which lists the gross fuel sales in both gallons and dollars for each day, with petitioner's submitted adjusted taxable fuel sales. The auditor tallied the amounts for five quarters, and none of them were equal (or close to equal) to the gross receipts used in petitioner's proposed recalculation of the additional tax due of \$30,537.00. This further confirmed the auditor's conclusion as to the lack of reliability of the accuracy of petitioner's books and records.

16. In order to determine whether nonfuel sales, i.e., cigarettes, soda, phone cards, motor oil and miscellaneous other items were properly reported, the auditor chose four quarters within the audit period (quarters ending 8/31/04, 5/31/05, 8/31/05 and 11/30/05) to test for sales other than fuel, from the convenience store. Based upon purchase invoices provided by petitioner for those periods, the auditor listed all taxable items, including cigarette purchases from HLA, petitioner's main supplier of cigarettes, and all corresponding cigarette prepaid tax data.

17. Utilizing the HLA invoices provided by petitioner for the test quarters, the auditor extracted the cigarette prepaid tax and compared it to that which was reported on petitioner's returns as prepaid tax. According to the available invoices, petitioner claimed more prepaid tax than it was entitled to, and the auditor computed an error rate of 5.4% to reflect this fact.

18. In order to verify whether the sales of all items were reported, having no sales invoices or register tapes for the test period, the auditor performed a markup test on the purchases, to arrive at audited gross sales. He first determined the markup percentages to be applied to each category of purchases. On December 13, 2006, when the investigator visited petitioner's business, he noted the price list of the cigarettes on that day. The average price per pack was approximately \$6.90, based on his list of 14 different brands. When the auditor computed cigarette sales for each of the four test quarters, he used \$65.00 as the estimated selling price per

carton. Based upon the observation of the auditor during the field audit, he determined markup percentages on the cost of soda (100%), phone cards (18%), motor oil (50%) and miscellaneous items (30%). The auditor determined that for the four quarters, the additional gross sales of nonfuel items totaled \$35,752.00. Comparing the additional sales to the reported nonfuel sales for the test period (\$27,630.00), the auditor computed an error rate of 129.4%.

19. Using the two error rates, the auditor completed his computation of additional sales tax due on nonfuel items as follows:

a) He applied the 5.4% error rate to the prepaid cigarette tax as reported by petitioner on its tax returns for all the quarters except the test quarters (for which he used the amounts actually allowed or disallowed from the actual test), and determined an amount for disallowed prepaid cigarette tax.

b) He grossed-up reported nonfuel taxable sales per petitioner's returns to result in gross nonfuel sales, to which he applied the error rate of 129.4% to arrive at audited additional nonfuel gross sales.

c) He divided the amount in (b) by 1 plus the sales tax rate for each quarter, to arrive at audited additional taxable nonfuel sales, and then computed the sales tax due on those amounts.

d) To the sales tax due, he added the disallowed prepaid cigarette tax for which petitioner took credit (computed in [a] above), to arrive at tax due on audited nonfuel sales in the amount of \$8,116.69.

20. The nonfuel sales tax per audit (\$8,116.69) plus the fuel sales tax per audit (\$78,301.56) resulted in the total assessment of \$86,418.25. The Division issued a Notice of Determination to petitioner dated May 19, 2008, asserting additional sales tax due in the amount of \$86,418.25 plus penalty and interest for the period September 1, 2003 through August 31,

2006. A second assessment issued to Mr. Abdo as a responsible officer, dated June 2, 2008, asserted the same amount due for the same audit period.

21. Petitioner executed a Consent Extending the Period of Limitation for Assessment, dated March 12, 2008, which allowed the Division until December 31, 2008 to assess additional taxes for the period September 1, 2003 through November 30, 2005.

SUMMARY OF THE PARTIES' POSITIONS

22. Petitioner contends that the Division's use of external indices was improper in this case, since pursuant to 20 NYCRR 533.2(b), petitioner's daily ledgers and supporting independently verifiable evidence were adequate to confirm taxable sales, and were not taken into consideration during the audit.

Petitioner also maintains that the auditor's method for determining the retail price per gallon based upon an improper cost markup is a methodology that lacked a rational basis and resulted in an unreasonably inaccurate estimate of petitioner's tax liability.

Petitioner asserts that the Division's failure to adjust for prepaid cigarette tax credits to which petitioner was entitled and the assessment of nontaxable items purchased from a vendor who supplies nontaxable goods were other errors committed by the Division.

Finally, petitioner believes that since its miscalculation of gross fuel receipts was due to reasonable cause and not willful neglect, penalties and additional interest should be abated.

23. The Division argues that petitioner has never produced adequate books and records from which it could have performed a detailed audit, even though requested to do on numerous occasions. In the absence of books and records sufficient to perform such an audit, the Division believes it was justified in resorting to an estimated audit methodology, which it argues was reasonable and reasonably calculated the taxes due.

The Division further argues that petitioner bears the burden of proving that the assessment was erroneous and has not done so. The Division disagrees with petitioner's claim that it provided sufficient documentation for sales to be calculated.

Finally, the Division maintains that petitioner has not demonstrated reasonable cause for the abatement of penalties, offering little, if any, evidence to establish that its failure to pay the correct tax due was due to reasonable cause and not wilful neglect. The Division adds that petitioner's failure to maintain and provide any sales records is, in itself, grounds for sustaining the penalties. Since the burden of proof rests with petitioner on the issue of its entitlement to abatement of penalties, the Division argues that petitioner has not met its burden herein.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][i][A]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices" When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.*, as follows:

To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858]) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), "from which the exact amount of tax due can be determined" (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Organization. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (*Matter of Grecian Sq. v. Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).

C. There is no dispute that the Division made an adequate request for all of petitioner's records related to its sales tax liability for the entire audit period. Among the documents produced by petitioner at the time of the audit were incomplete fuel and nonfuel purchase invoices, handwritten daily shift reports lacking the amount of sales in dollars, bank statements,

tax returns, and register shift tapes only spanning the period July 6, 2006 to the end of the audit period. Petitioner failed to provide a daily record of all cash and credit sales for the entire audit period, general ledgers, or any source documentation to substantiate the fuel and nonfuel sales from its operations.

D. Tax Law § 1135(a) provides that every person required to collect tax shall keep records of every sale, the amounts paid on those sales and the tax due thereon. The regulations promulgated thereunder dictate that the sales records required by Tax Law § 1135(a) *must* contain the sales slip, invoice, receipt, contract, statement or other memorandum of sale (20 NYCRR 533.2[b][1][i]), cash register tapes and any other original sales documents (20 NYCRR 533.2[b][1][iii]). In addition, the regulations require that where no written document is given to the customer, the seller shall keep daily records of all cash and credit sales in a day book or similar book (20 NYCRR 533.2[b][1][iii]). These provisions bear witness to the spirit and intention of Tax Law § 1135(a), which was to insure that the records required to be kept provide sufficient detail to independently determine the taxable status of each sale and the amount of tax due and collected thereon or be substantiated by an analysis of supporting records (20 NYCRR 533.2[b][2]).

E. During the audit, petitioner did not produce a general ledger, a ledger of shift reports sufficient to establish accurate sales, or any evidence of cash sales of fuel. It is unclear what records petitioner used to complete its sales tax returns, and no records could be reconciled with the returns provided. The bank statement could not be reconciled to amounts on the second ledger, such that they could substantiate petitioner's sales. Petitioner maintains that the shift reports it maintained were not only verifiable, but constituted comprehensive fuel and nonfuel general ledgers, alluding primarily to the second ledger created for the purpose of litigation,

which is no more substantiated than the original handwritten ledger. The shift reports are raw summaries of a day's operations, which include gross amounts for sales of fuel in gallons and dollars (in the case of the second ledger), and gross sales of convenience store items. The information contained in the reports was not itself auditable because there was no source documentation underlying the data for the entries, i.e., there was no documentation which would allow one to trace a transaction from purchase of the commodity to the final sale transaction with the customer, most notably for motor fuel sales. Further, there was no breakdown of cash sales for fuel, no accounting for the substantial number of credit card sales, and no separation of taxable and nontaxable convenience store items. Although the second ledger contained a column for gross fuel sales by dollar, which was missing in petitioner's original ledger, there remains no source documentation to verify the accuracy of the reporting of all sales. Gross nonfuel sales are not divided, as required, into taxable and nontaxable. Even though the gallons of gasoline sold from a total of four grades listed on the daily shift sheets of the ledger can be traced to the monthly inventory record of the gallons sold from the two original grades, the issue of the lack of source documentation to verify the accuracy of sales as reported still remains. Petitioner's claim that the shift reports were an accurate record of its sales is simply not supported by the record.

F. As part of its supporting evidence, petitioner pointed to its submission of bank statements for the audit period. The bank deposits could not, however, be traced from the daily ledger. The vast majority of the deposits were even dollar amounts, often similar in amount at slightly under \$10,000.00, and were not reconciled in any way to a sales journal. The statements simply did not support petitioner's assertion that it had engaged in proper record keeping.

Petitioner submitted a third-party summary of cigarette purchase invoices from its vendor HLA for the period September 1, 2003 to August 31, 2006 in support of its alleged reliable

record keeping. Third-party verification is often useful when determining the reliability of books records, as well as methods of reporting. The auditor was provided with HLA purchase invoices as part of his analysis of convenience store sales. A comparison of the third-party information and purchase invoices for two quarters, however, yields the following results: for the period June 1, 2004 through August 31, 2004, the HLA invoices provided by petitioner for the auditor to review totaled \$7,550.00. According to the HLA sales receivable summary, for the same period, petitioner purchased an additional \$9,457.00 in cigarettes. For the period September 1, 2005 through November 30, 2005, the HLA invoices provided by petitioner for the auditor to review totaled \$7,689.00. The HLA records for the same period showed an additional \$11,656.00. The discrepancy between the purchase invoices provided by petitioner and the third-party sales summary was not explained. Clearly the records were not only unreliable, but it is likely that as a result, the reporting of sales was grossly distorted. Under these circumstances, it was not possible for the Division to verify taxable sales and receipts and conduct a complete audit.

The record amply demonstrates that sales records for motor fuel as well as convenience store items were not maintained as prescribed by Tax Law § 1135(a) and the regulations promulgated thereunder, and no other source documentation of sales existed. It is clear from the record that the auditor reviewed the records presented by petitioner and correctly concluded that they were not adequate to do a complete audit since there were no source documents, i.e., sales invoices, complete purchase invoices or cash register tapes (other than the last two months of the audit period), submitted by petitioner (*see Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal*, 162 AD2d 765, 557 NYS2d 678 [1990], *lv denied* 77 NY2d 803, 567 NYS643 [1991]; *Matter of Club Marakesh v. Tax Commn. Of State of New York*, 151 AD2d 908, 542 NYS2d 881 [1989], *lv denied* 74 NY2d 616, 550 NYS2d 276 [1989]).

G. Having established that the records were so insufficient that it was virtually impossible to verify taxable sales by means of a complete audit (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44 [1970]), the Division was entitled to resort to an estimate of petitioner's sales, as long as the method was reasonably calculated to reflect the taxes due. (*Matter of W.T. Grant v. Joseph*, 2 NY2d 196, 159 NYS2d 150 [1957], *cert denied* 355 US 869 [1957].)

The Division chose to use a cost markup method that utilized the purchase records provided by petitioner for both the fuel and nonfuel sales. The details of the audit calculations as set forth in Findings of Fact 7 through 20 show that the estimated methodology utilizing petitioner's available records had a rational basis and was reasonably calculated to reflect the taxes due (*see e.g. Matter of AGDN, Inc.*, Tax Appeals Tribunal, February 6, 1997), and reached a result that petitioner has not shown to be erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842 [1986]). It is well established that exactness in the audit result is not required, for any imprecision that arises from the taxpayer's failure to maintain adequate books and records as required under the Tax Law is properly borne by the taxpayer (*see Matter of Cronos Enterprises*, Tax Appeals Tribunal, December 13, 2007).

H. Petitioner had the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (*see Matter of Your Own Choice, Inc.*). Petitioner failed to meet this burden. Although petitioner offered some evidence of the existence of records in an attempt to refute the use of any estimated methodology, such as the HLA third-party sales to petitioner, in several circumstances those records highlighted the unreliability of petitioner's records and record keeping, and revealed even more glaring inconsistencies in the reporting of sales.

I. In order to abate penalties, a taxpayer must show that the failure to comply with the law was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii]). Here, petitioner has not established that its underreporting of sales resulted from anything other than its own failure to maintain accurate records of sales, and therefore, as there has been no showing of reasonable cause and the absence of willful neglect for its failure to pay the sales tax, there is no basis for abating the penalties assessed (*Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992).

J. The petitions of K&A Gas & Go Mart, Inc. and Kassem Abdo are denied and the notices of determination, dated May 19, 2008 and June 2, 2008, respectively, are sustained.

DATED: Troy, New York
February 17, 2011

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE